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No. 86-2035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

GEORGE O. ALDRIDGE and DAISY M. ALDRIDGE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

H. RUSSELL SMOUSE *
GEORGE F. PAPPAS
HOLLY N. LINDEMAN
MELNICOVE, KAUFMAN, WEINER, SMOUSE & GARBIS, P.A.
36 South Charles Street
600 Charles Center South
Baltimore, Maryland 21201-3060
(301) 332-8581
Counsel for Petitioner

* Counsel of Record

Of Counsel:
C. KEITH MEISER
500 Water Street
Jacksonville, Florida 32202
(904) 359-1403

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Petitioner ("B&O"), successor to The Baltimore & Ohio Railroad Company, the appellant below, addresses the following Reply to the arguments raised in Respondents' Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondents George M. and Daisy O. Aldridge ("Aldridge") devote the first third of the Opposition to an extended factual recitation which fails to controvert two essential points made in the Petition: first, that the B&O was found negligent and therefore liable under FELA for failing to prevent a drunken driver's ("Brelsford's") assault on Aldridge, in the absence of any evidence that, previously, motorists delayed at a partially blocked rail-

road intersection had ignored a stationed crossing watchman's warnings against passage;[1] and second, that the trial judge, by his own acknowledgment, rejected the B&O's timely request for an instruction that any award for Aldridge's lost future earnings must be reduced to present value.[2]

REASONS FOR ISSUING THE WRIT

A.

Despite Aldridge's effort to cloud the issue, it is clear both that a FELA defendant has a fixed federal right to have a present value instruction given to the jury on request, and that such a request was made by the B&O and denied by the trial judge. In United States District Judge Black's own words (Petition, App. 37a):

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[1] At page 4 of the Opposition, Aldridge asserts that "sometimes cars did cross in front of the trains when the crossing was partially blocked." The record is clear, however, that this did not occur when a watchman, like Aldridge, guarded the intersection and directed waiting motorists to stay put, which is precisely why the watchman was engaged.

The remaining catalogue of complaints aired by Aldridge relate to the B&O's supposed failure to "give a warning as to whether the train is going to move." (Opposition, p. 3). As there is no dispute that Aldridge positioned himself to stop traffic, and as the drunken motorist who caused the injury had in fact stopped at the crossing, unambiguously signaling his understanding of the risk, it is immaterial whether or not the B&O gave other or additional warnings. The sole issue is the foreseeability of Brelsford's deliberate (and indeed criminal) disregard of Aldridge's presence and instructions, which the record refutes.

[2] At pages 7-8 of the Opposition, Aldridge implies that the B&O waived its right to a present value instruction by failing to present a proposed instruction and/or by failing to object to the trial court's refusal to instruct. Aldridge recognizes, however, that the trial judge understood such a request to have been made, and that the B&O's post-judgment objection was denied. Under these circumstances, Aldridge's waiver argument (which has been addressed to and rejected by the Fourth Circuit as well as by the District Court) is disingenuous as well as specious.

> In answering B&O's argument that it was error to omit the instruction on discounting, the plaintiffs assert that B&O waived any claim of error by not requesting the instruction, not objecting to its omission, or not otherwise preserving the issue. Although the transcript does not show clearly that a request was made or omission objected to, it adequately demonstrates that the issue was preserved. After the Court denied B&O's motion for a mistrial, counsel for B&O stated: "You're not going to say anything about present [value]?" The Court replied, "Oh, no. I don't think most people have the faintest idea what we would even be talking about." The Court understood this to be a request for the instruction, and denied that request. Moreover, the Court was aware that B&O desired an instruction on the discount, and the Court considered that desire and the propriety of such an instruction before deciding not to give it. In that light, this Court is of the opinion that B&O has not waived its objection to the lack of an instruction on present value.

Not only did the B&O timely request a present value instruction,[3] but its objection to the unreduced award was further pressed in a post judgment motion for a new trial, which was similarly denied. (Petition, App. 39a). Aldridge's suggestion (Opposition, p. 11-12), that "the trial court clearly made an overt and deliberate choice in the presence of counsel, *and without any objection by counsel*, to utilize the 'total offset' concept of present worth. . . ." is, in light of the strenuous objection asserted by the B&O at trial and thereafter, ludicrous in the extreme.

Moreover, the premise that the trial court's action was deliberate is erroneous. Judge Black expressly disclaimed any deliberate choice of discount method, agreeing that

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[3] The B&O alternatively moved for a mistrial on the ground that Aldridge's failure to prove the present value of his future wage loss precluded the jury from awarding damages for such loss. The trial court denied this motion just as it refused to instruct.

inflation "doesn't necessarily" offset the present value reduction, that determination being "what the jury is to do." (Reply, App. 1a). The trial court refused the requested instruction not because it had been persuaded of the economic validity of the total offset approach (which it could not approve because no supporting evidence had been adduced by Aldridge), or because the parties had consented to its application, neither of which were true. Rather, the jury was permitted to retire uninstructed as to present value solely because the trial judge considered that, without the benefit of expert testimony, they would not "have the faintest idea what we would even be talking about." (Reply, App. 2a).

The trial court essentially threw up its hands, electing by default the total offset formula and refusing even to instruct the jury regarding the "self-evident" principle that the unreduced award sought by Aldridge would afford "more than compensation." *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489 (1916). This Court's recent admonition, that although "no single method for determining present value is mandated by federal law . . . an utter failure to instruct the jury that present value is the proper measure of a damage award is error",[4] was disregarded.

Aldridge responds (Opposition, pp. 13-14) that neither *Kelly* nor *Dickerson* "employ the imperative 'shall' or 'must' in stating that an award *should* (*Dickerson*) or *ought to be* (*Kelly*) made up on the basis of their present worth," such that, "although the present worth concept is proper and appropriate where an award for future lost earnings is concerned, it apparently is *not* absolutely mandatory under all circumstances including the circumstances of this case."

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[4] *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 410 (1985).

This half-hearted defense only underscores the weakness of Respondents' Opposition. This Court has strictly limited, to situations involving willing litigants who expressly stipulate prior to trial to use of the total offset approach, the circumstances in which the lower courts are relieved of their obligation under federal law to "make a deliberate choice" of discount rate within the guidelines established in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). Where, as here, the "petitioner had insisted that if compensation was to be awarded, it 'must be reduced to its present worth' ", *id.* at 551, the trial court has no alternative but to instruct the jury accordingly. *Dickerson*, 470 U.S. at 413. The court below utterly abdicated its duty in this regard.

Aldridge attempts to forestall this Court's scrutiny of the record by mischaracterizing the B&O as advocating the imposition of "a single mandatory and uniform rule" of discount. (Opposition, p. 16). In fact, the B&O seeks nothing that this Court has not already pronounced; namely, a reaffirmation of the principle that although "no single method for determining present value is mandated by federal law . . . an utter failure to instruct the jury that present value is the proper measure of a damage award is error", *id.*, and a clear articulation that such failure cannot be justified by reference to the railroad's forebearance to introduce evidence of the present worth of the employee's lost future earnings.

Aldridge admits that a clear conflict among the circuits exists as to the burden of proof issue. The federal courts are, however, far less evenly divided than the Respondents suggest. Aside from the Ninth Circuit's decision in *Alma v. Manufacturer's Hanover Trust Co.*, 684 F.2d 622 (9th Cir. 1982), which precedes and is discredited by both *Pfeifer* and *Dickerson*,[5] the Fourth Circuit's

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[5] *Alma* holds that where "competent evidence of the discount rate is presented, but the plaintiff fails to establish an inflation rate,

ruling is an anomaly, as Aldridge's own citations (Opposition, pp. 18-19) demonstrate.[6]

In none of these cases, and in none of the decisions cited at pages 9-10 of the Petition, did the railroad defendant introduce any evidence as to the appropriate discount rate. The Fourth Circuit and the Ninth are alone in refusing a requested present value instruction on this ground and in permitting, contrary to *Dickerson* and its antecedents, a gross, overcompensatory award for lost future wages to stand.

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the trial court must, of course, discount the lump award to present value and make an adjustment for inflation. Similarly, where the plaintiff adequately proves the inflation factor, but the defendant fails to establish the discount rate, the lump sum must be adjusted only for inflation." 684 F.2d at 626. The underlying assumption that "these two factors [i.e. inflation and discount rate] operate independently", *id.*, was expressly rejected by this Court in *Pfeifer*. 462 U.S. at 539-40.

[6] In *Ivy v. Security Barge Lines*, 585 F.2d 732, 739 (5th Cir. 1978), the Fifth Circuit declared it "incumbent on the lower court to instruct the jury to discount the award to present value had such instruction been timely requested," but concluded that an objection aired only after "the trial judge had instructed the jury in substantial accordance with counsel's requests" was untimely. In any event, following *Pfeifer*, the Fifth Circuit reduces routinely. See *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983). In *Kokesh v. American Steamship Co.*, 747 F.2d 1092, 1096 (6th Cir. 1984) the Sixth Circuit merely declined to reverse an undiscounted award sua sponte where "neither party had proposed a present value charge or objected to the trial judge's instructions on compensatory damages . . . and neither party has raised the issue on appeal." In *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982), cited in *Pfeifer*, 462 U.S. at 542 n.26, Judge Posner approved application of a below market discount rate of between 3.5 and 5.5 percent. Finally, in *Deakle v. John E. Graham & Sons*, 756 F.2d 821, 832 (11th Cir. 1985), the court "simply note[d] that this Circuit has chosen from among the methods currently available the approach which utilizes a below market discount rate . . . not at issue here."

B.

Turning to the liability issue, Aldridge argues that review by writ of certiorari is unwarranted because the evidence presented at trial is sufficient to support the jury's finding that the B&O was negligent. But Aldridge refers to nothing in the record to indicate that the railroad knew or should have known that a motorist like the intoxicated, grossly reckless Brelsford might defy the shouted orders of the crossing watchman, run the partially blocked intersection and flee the scene.[7] Indeed, the absence of prior similar incidents, or of crossing accidents of any kind when a guard was in station, establishes as a matter of law the unforseeability of such intervention,[8] and therefore the B&O's lack of fault.

Aldridge attempts to distinguish this case from *Inman v. B&O R.R. Co.*, 361 U.S. 138 (1959), where this Court held the railroad not liable for an outcome it could not reasonably have anticipated. The superficial distinctions identified by Respondents[9] are immaterial to the fundamental question whether the B&O had fair warning of danger to its employee, such that it was negligent in failing to prevent the injury which occurred.

The answer, based on the record considered in light of this Court's precedent, is clear: Brelsford's criminal intervention was an admittedly unfortunate, but nevertheless unforeseeable, act on which liability under FELA may not be predicated.

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[7] Aldridge states (Opposition, p. 22) that the record contains evidence of motorists crossing partially blocked intersections. Aldridge fails to mention that until the night he was injured, such motorists had consistently obeyed a crossing watchman's prohibitionary directions.

[8] See *Lillie v. Thompson*, 332 U.S. 459 (1947).

[9] *Inman* involved a moving train proceeding through a crossing while in this case the train was standing in the intersection engaged in switching activities.

CONCLUSION

The decision below renders meaningless the FELA standard of negligence as well as the requirement that awards under federal law for lost future earnings be reduced to compensatory present value. Unless this Court grants the Petition for Writ of Certiorari, the present conflict among the circuits, and the Fourth Circuit's gross misapplication of the law, will continue.

Respectfully submitted,

H. RUSSELL SMOUSE *
GEORGE F. PAPPAS
HOLLY N. LINDEMAN
MELNICOVE, KAUFMAN, WEINER, SMOUSE & GARBIS, P.A.
36 South Charles Street
600 Charles Center South
Baltimore, Maryland 21201-3060
(301) 332-8581
Counsel for Petitioner

* Counsel of Record

Of Counsel:
C. KEITH MEISER
500 Water Street
Jacksonville, Florida 32202
(904) 359-1403

APPENDIX

* * * *

AFTERNOON SESSION-PROCEEDINGS

THE COURT: Yes, gentlemen.

MR. PAPPAS: Judge, I just have one matter. Having an opportunity to consider it over lunch, in all candor, Judge, I think that argument by Mr. Beauchemin about future wage loss when it had not been reduced to present value by an economist, I submit, respectfully, sir, it's the B&O's position that that's error and I must respectfully move for a mistrial at this point.

I think it's prejudicial to the B&O and, Judge, I don't think an instruction takes care of it because the instruction just basically explains to them what present value is. That would totally confuse them under these circumstances because there hasn't been any discussion of what present value is. And I must say I've had a chance to consult with certain wiser and older counsel over lunch and at least it's my understanding, and that's what was troubling me at the bench, is that it's a factual predicate and an element of the plaintiff's proof to put somebody on the stand, if you're going to claim future wage loss, and then take that number and then reduce it by economically accepted principles to the present value and the offset of reduction of present value and inflation doesn't necessarily end up at the bald number that is put down just by multiplying the man's wage to date times twelve years is the future—

THE COURT: It doesn't necessarily, no way anybody knows. That's what the jury is to do.

MR. PAPPAS: I understand, Judge. I think that—

THE COURT: Well, and is there authority Mr. Pappas, that says that you can't get future earnings unless you prove it by an actuary?

It just interests me, because in fourteen months I haven't had anybody put such evidence in, so not all

personal injury lawyers are doing it, I guess, including Mr. Beauchemin.

MR. PAPPAS: Well, I haven't had time to get it together, Judge.

THE COURT: Okay. Well, I'll leave that for a higher authority and deny your motion for a mistrial and accordingly also not include any reference to it in my instructions.

MR. PAPPAS: All right. You're not going to say anything then about present—

THE COURT: Oh, no. I don't think most people have the faintest idea what we would even be talking about. Okay. Well, then I guess we're ready for the jury.

(Thereupon, the jury returned to the courtroom at 1:40 o'clock p.m.)

* * * *